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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/507,339	03/28/2005	Shelley Hiron	7865-171 MIS	2858

7590 09/23/2005

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EXAMINER	
WEIER, ANTHONY J	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 09/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/507,339	HIRON, SHELLEY	
	Examiner	Art Unit	
	Anthony Weier	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-3 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-3 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-3 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 1 and 3, it is not clear what degree of denaturation is permissible in view of the term "substantially undenatured canola protein isolate".

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5 are rejected under 35 U.S.C. 102(a) as being anticipated by either one of "New Technology Isolates Canola Protein" article (henceforth "Food Engineering) or Asia Pacific Food Industry article (henceforth "Asia Pacific") or rejected under 35 USC 102(b) as being anticipated by GB 2077739.

Food Engineering discloses the canola protein isolate as claimed in which said isolate has a protein content of 90% based on Kjeldahl nitrogen x 6.25 on a dry weight basis and is used in

as a protein replacement for animal proteins in foods that normally contain same.). It is expected that the canola protein isolate of Food Engineering contains the same 7S, 12S, and 2S proteins since same are present in canola protein isolate in general and the same percentages claimed due to the similarity in the functional characteristics of both Food Engineering and the instant invention. It should be further noted that Food Engineering discloses the canola protein isolate in a dried form.

GB 2077739 discloses the canola protein isolate as claimed in which said isolate has a protein content of 95% based on Kjeldahl nitrogen x 6.25 on a dry weigh basis wherein same is spray-dried and is used, for example, as an egg white substitute in foods containing egg white (see page 4). It is expected that the canola protein isolate of GB 2077739 contains the same 7S, 12S, and 2S proteins since same are present in canola protein isolate in general and the same percentages claimed due to the similarity in the functional characteristics of both GB 2077739 and the instant invention.

Asia Pacific discloses the canola protein isolate as claimed in which said isolate has a protein content of 107% based on Kjeldahl nitrogen x 6.25 on a dry weigh basis wherein same is dried and is used, for example, as an egg white substitute in foods containing egg white. It is expected that the canola protein isolate of Asia Pacific contains the same 7S, 12S, and 2S proteins since same are present in canola protein isolate in general and the same percentages claimed due to the similarity in the functional characteristics of both Asia Pacific and the instant invention.

It is noted that claims 2 and 3 call fort he particular method by which the canola protein concentrate is attained. However, it should be noted that patentability is based on the product

itself and does not depend on its production. Moreover, it is not seen where the particular product produced by employing the different processes or combination of same would provide for a different product from that set forth in Food Engineering, Asia Pacific or GB 2077739. In re Thorpe, 227 USPQ 964.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over any one of Cameron et al or Murray et al (U.S. Patent No. 6005076)).

Either one of Cameron et al or Murray et al discloses a canola protein isolate as claimed in which said isolate has a protein content of greater than 90% based on Kjeldahl nitrogen x 6.25 on a dry weigh basis wherein same is dried and used in food products.

Both Cameron et al and Murray et al are silent regarding the use of said canola protein isolates as a replacement ingredient in a food composition. However, it is well known to use such canola protein isolates, for example, as replacements for egg whites in foods as taught, for example, by either one of Food Engineering or Asia Pacific. Moreover, GB 2077739 teaches its use in general as substitute for animal protein in foods. It would have been obvious to one having ordinary skill in the art at the time of the invention to have incorporated the canola protein isolate of Cameron et al or Murray et al as a replacement in foods as taught in any one of Food Engineering, Asia Pacific, or GB 2077739 as a matter of consumer convenience.

It is noted that claims 2 and 3 call fort he particular method by which the canola protein concentrate is attained. However, it should be noted that patentability is based on the product itself and does not depend on its production. Moreover, it is not seen where the particular product produced by employing the different processes or combination of same would provide for a different product from that set forth in Cameron et al or Murray et al. In re Thorpe, 227 USPQ 964.

Double Patenting

4. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

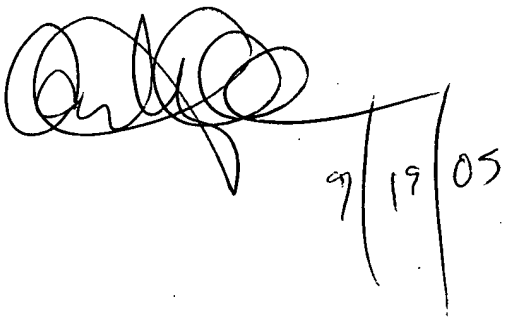
A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claims 1-3 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-3 of copending Application No. 10/137306; claims 1-3 of 10/384699; claims 1-5 of 10/493023; claims 35-38 of 11/086458; and claims 1-9 of 10/274886. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier
Primary Examiner
Art Unit 1761



Anthony Weier
September 19, 2005